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RULE OF LAW GOES GLOBAL SYMPOSIUM

Does the African Union truly defy the United Nations peace and security regime?

HANNAH BIRKENKÖTTER — 9 July, 2015

A response to Theresa Reinold

In her recent post, Theresa Reinold critically examines the efforts by the African Union to further democracy on the African continent. She pertinently notes that these efforts suffer from an incumbency bias, favoring already established regimes over potential political change, especially in states where no open democratic culture exists. I find her argument by and large convincing and would like to focus on one specific aspect: Does Art. 4 (h) of the Constitutive Act,

which in its amended form might in the future allow for military intervention in the event of a "serious threat to legitimate order", defy supremacy of the United Nations Charter? When the amendment was adopted, it was labeled "the first true blow to the constitutional framework of the international system established in 1945 predicated on the ultimate control of the use of force by the United Nations Security Council". One could then read Art. 4 (h) of the Constitutive Act as yet another conflict between a regional legal framework and the United Nations collective security system, much in the same way in which the European Union's Court of Justice challenged the UN Security Council in its much discussed Kadi judgment.

Military intervention without UN Security Council authorization: Art. 4 (h) of the Constitutive Act

At present, Art. 4 (h) of the African Constitutive Act allows the Union to intervene in "respect of grave circumstances, namely: war crimes, genocide and crimes against humanity". Once the 2003 Amendment to the Constitutive Act enters into force (as of 2014, 28 members of the AU had ratified the Protocol on the amendments; 36 ratifications are needed for the Protocol to enter into force), Art. 4 (h) will ensure "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity *as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council*;" (part added by the amendment in italics, highlight not in the original).

Both in its current as well as in its amended form, Art. 4 (h) of the Constitutive Act does not foresee any prior authorization by the United Nations Security Council. And in its amended form, it seems at least theoretically possible that Art. 4 (h) opens the door to far-reaching military interventions, e.g. in the case of an unconstitutional change of government. However, both the negotiating history as well as the current practice of military intervention over the past decade indicate that the African Union is, as of now, rather reluctant to apply Art. 4 (h) to situations of internal unrest within a member state of the Union.

An ambivalent negotiating history

According to legal adviser to the African Union Ben Kioko, the amendment to Art. 4 (h) of the Constitutive Act can be traced back to Libya's proposal to expand the right to intervention by the African Union to "cases of unrest or external aggression in order to restore peace and stability to the Member of the Union". Libya argued that this proposal would ensure the "sovereignty and territorial integrity of the African Continent" (here, at 811 et seq). While this proposal was ultimately rejected, it shows that Art. 4 (h) in its amended form is not unequivocally aimed at unconstitutional changes of government or, in fact, at internal affairs at all. Of course, this is but an indicator that the African Union might not readily use the provision to legitimize military interventions in cases of unconstitutional regime change – after all, the language of amended Art. 4 (h) would leave the door open to such an interpretation.

High threshold, high costs

However, the threshold for intervention in the event of a "serious threat to legitimate order" is still rather high: any decision by the Assembly (which requires at least a two-thirds majority according to Art. 7 of the Constitutive Act) would also necessitate a prior recommendation by the African Peace and Security Council, which equally decides via consensus, and failing that, a two-thirds majority (Art. 8 (13) of the Protocol establishing the Peace and Security Council).

Second, Art. 4 (h) needs yet to be applied in practice as the stand-alone legal basis for military intervention. In 2003, legal adviser Ben Kioko was carefully optimistic that the Assembly would not misuse its power and decide upon an intervention without careful consideration. He also argued that from a financial point of view, the African Union would find it necessary to cooperate with the United Nations, rather than openly challenge the UN Security Council. Recent history appears to prove him right. There has, as of now, not been any conflict in which the African Union's peace and security regime has openly clashed with the United Nations peace and security regime. Erika De Wet shows that military intervention by the African Union has either relied on consent by the incumbent government or was authorized by the United Nations Security Council, or both. And while there might be tensions between the African Union and the United Nations when it comes to joint operations, as recently described for the case of Mali, the African Union has been reluctant to circumvent the UN Security Council even in "hard" cases of war crimes and crimes against humanity.

Should we then lean back and simply ignore that a conflict exists on paper? I believe not. Even if the African Union has

until now been reluctant to invoke Art. 4 (h) as the legal basis for a military intervention, this situation might change in the future. Art. 4 (h) is yet another indicator of an ever-more fragmented international legal system in which regional organizations openly challenge the post-World War II security arrangement as it celebrates its 70th birthday, and as such, ought to be taken seriously.

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